HIGH COURT OF AUSTRALIA

14 March 2018

MICHAEL JAMES IRWIN v THE QUEEN
[2018] HCA 8

Today, the High Court unanimously dismissed an appeal from a decision of the Court of Appeal of the Supreme Court of Queensland that the jury's verdict that the appellant was guilty of one count of unlawfully doing grievous bodily harm was not unreasonable or unsupported by the evidence.

The appellant's conviction arose from a confrontation between the appellant and the complainant which resulted in the complainant's left hip breaking in three places. The appellant's account of the confrontation was that he had pushed the complainant in the chest, causing the complainant to stumble back three or four metres and fall "reasonably hard" onto the ground. That account was consistent with medical evidence that the complainant's hip injury was a high-energy fracture. The fracture required a high degree of force and was consistent with the complainant being pushed and then falling directly onto his left side on a hard surface with some speed. The complainant gave a different account of the confrontation. Parts of the complainant's account were inconsistent with the medical evidence and the evidence of an independent witness, and that account was very likely to have been rejected.

Section 23(1) of the *Criminal Code* (Q) provides that a person is not criminally responsible for an event that the person does not intend or foresee as a possible consequence, and that an ordinary person would not reasonably foresee as a possible consequence. The appellant accepted that the trial judge had correctly directed the jury as to the effect of s 23(1). The appellant appealed his conviction to the Court of Appeal, however, on the basis that the jury could not rationally have excluded the possibility that an ordinary person in the appellant's position would not reasonably have foreseen the possibility of an injury of the kind sustained by the complainant as a possible consequence of pushing the complainant in the manner described by the appellant. The Court of Appeal dismissed the appeal, stating that an ordinary person in the appellant's position "could have foreseen" that the complainant might suffer a serious injury such as a fractured hip from a push involving "a considerable degree of force".

By grant of special leave, the appellant appealed to the High Court on grounds including that the Court of Appeal had erred by applying the test of whether an ordinary person *could*, rather than *would*, have foreseen the possibility of the kind of injury suffered by the complainant. The High Court held that there is a difference between what an ordinary person would and could reasonably foresee: the former involves a degree of probability whereas the latter is a matter more akin to mere possibility. Therefore, the Court of Appeal should not have expressed the test in the terms it did. The High Court held, however, that there was no reason to doubt that the jury had adhered to the trial judge's proper directions as to the effect of s 23(1), and no cause to doubt the reasonableness of the verdict. The High Court further held that the Court of Appeal had not erred by stating that the appellant had pushed the complainant with "a considerable degree of force", or by its observation that there were "equally open" interpretations of the evidence before the jury. Accordingly, the appeal was dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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